



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 5, 2005

Mr. John T. Patterson  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2005-03901

Dear Mr. Patterson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 223507.

The City of Waco (the "city") received two requests from the same requestor for 17 categories of information regarding easements, traffic control devices, property at a specified address, a traffic accident that occurred at a nearby intersection, and related matters. You inform us that the city will release some of the requested information. You claim that the remaining information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

We first note that the submitted information includes city ordinances. In Open Records Decision No. 551 (1990), this office addressed whether a city ordinance could be withheld from the public under the Act, stating:

It is difficult to conceive of a more open record. The law, binding upon every citizen, is free for publication to all. *Banks v. Manchester*, 128 U.S. 244, 253 (1888). This policy is based on the concept of due process which requires that the people have notice of the law. *Building Officials & Code Admin. v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980). Given this

constitutional consideration, it is difficult to hypothesize a circumstance that would bring a law or ordinance within an exception to public disclosure.

Accordingly, the city ordinances that we have marked must be released to the requestor.

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Under this section, “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” must be released to the public, unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Gov’t Code § 552.022(a)(1). In this instance, the submitted information includes completed reports made of, for, or by the city. These reports must be released under section 552.022(a)(1) unless they contain information that is excepted from disclosure under section 552.108 or expressly confidential under other law. You do not claim an exception to disclosure under section 552.108. Section 552.103, which you do claim, is a discretionary exception that protects a governmental body’s interests and may be waived. *See* Gov’t Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov’t Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov’t Code § 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the information that is subject to section 552.022(a)(1) under section 552.103.

With regard to the rest of the information, we address your claim under section 552.103. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the

governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.*<sup>1</sup> This office has concluded that a governmental body’s receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If that representation is not made, the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You inform us that the city has received a claim that is in compliance with the TTCA. You state, and have provided documentation demonstrating, that the city received the claim prior to its receipt of these requests for information. You also state that the requested information is related to the subject of the claim. Based on your representations and the submitted documentation, we find that you have demonstrated that the city reasonably anticipated litigation on the date of its receipt of these requests for information. We also find that the remaining information at issue relates to the anticipated litigation. We therefore conclude that section 552.103 is applicable to the remaining information.

We note, however, that the opposing parties in the anticipated litigation may already have seen or had access to some of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to anticipated litigation, through discovery or otherwise, then there is no interest in withholding the information from public disclosure under section 552.103.

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<sup>1</sup>Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

*See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that the opposing parties in the anticipated litigation have seen or had access to any of the remaining information, the city may not withhold any such information under section 552.103. With the exception of any such information, the remaining information is excepted from disclosure at this time. We note that the applicability of this exception under section 552.103 ends when the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the city ordinances must be released; (2) the completed reports must be released under section 552.022(a)(1); and (3) except for any information that the opposing parties in the anticipated litigation have seen or to which they have had access, the city may withhold the rest of the submitted information at this time under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

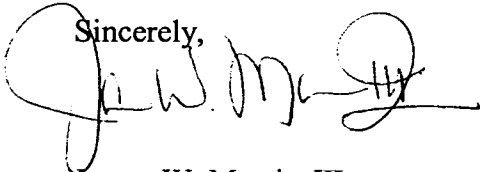
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', with a stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 223507

Enc: Submitted documents

c: Ms. Kimberly Munson  
The Barbknecht Firm  
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(w/o enclosures)